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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1972
No. .....

72-183

GARY CRAWFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Central District of California.

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This is a petition of Gary Crawford for a Writ of Certiorari to review the judgment and order made by the United States Court of Appeals for the Ninth Circuit on July 3, 1972, affirming the judgment against petitioner made and entered by the United States District Court for the Central District of California on July 30, 1971 after the court found the defendant guilty of the indictment on July 13, 1971. Petitioner was sentenced to serve a period of six months in custody.

The District Court's opinion was not reported. Copies of the affirming judgment and of the opinion of the United States Court of Appeals for the Ninth Circuit, which is not as yet officially reported, are attached. (Appendices "A" and "B" respectively.)

Jurisdiction.

The United States District Court for the Central District of California had jurisdiction of this cause by virtue of Title 18, United States Code, Section 3231; Title 21 United States Code, Section 841(a)(1); Rule 18 of the Federal Rules of Criminal Procedure.

The Circuit Court of Appeals for the Ninth Circuit had jurisdiction under Title 28, United States Code, Sections 1291 and 1294(1), and Rule 37(a) of the Federal Rules of Criminal Procedure.

This Court has jurisdiction under Title 28, United States Code, Section 1254(i) to review the judgment in question.

Statement of the Case.

On May 12, 1971, petitioner was indicted for violation of 21 United States Code, Section, 841(a)(1). The indictment charged that petitioner and two others illegally possessed a controlled substance (hashish) with intent to distribute.

Petitioner plead not guilty to the indictment and was tried by the United States District Court for the Central District of California sitting without a jury, on July 7, 1971. Prior to trial, petitioner moved to suppress as evidence, pursuant to Rule 41 of the Federal Rules of Criminal Procedure, the contraband which had been seized pursuant to a search warrant and which contraband formed the basis of the indictment. The motion was denied. Petitioner thereafter stipulated to the allegations of the indictment and incorporated by reference

the Rule 41 hearing into the trial record. The Court found petitioner guilty and the judgment of the District Court was entered on July 30, 1971, sentencing petitioner to serve a period of six months in custody.

On July 3, 1972, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction.

Questions Presented.

1. Whether the District Court and the Circuit Court of Appeals erred in its finding that the two prongs of the *Aguilar* test are not independent of one another.

2. Whether the District Court erred in finding that the second prong of the test established in *Aguilar v. Texas,* 378 U.S. 108 (1964), was satisfied by an affidavit which recited that the affiant had received information "from a confidential informant, whom I have worked with on previous occasions and whose prior information has proved valid."

Statute Involved.

Title 21, United States Code, Section 841(a)(1) provides:

> "§841. Prohibited acts A—Unlawful acts (a) Except as authorized by this subchapter, it shall be unlawful for any person knowlingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

Statement of the Facts.

On May 1, 1971, at approximately 10:45 PM, a United States Customs Agent received a telephone call from a confidential informant advising him that petitioner and two others had arrived at an apartment in Los Angeles, California and that they were in possession of five suitcases in which were secreted approximately 20 kilos of hashish. The Agent's affidavit in support of the search warrant went on to state that the three individuals were lodged in the informant's girlfriend's apartment and that they had shown the hashish to the informant and that he had smelled it.

With respect to the informant's previous reliability the affidavit stated only that the informant was someone with whom the Agent had "worked with on previous occasions and whose prior information has proved valid . . .". However, during the pretrial hearing pursuant to Rule 41, the Agent admitted upon cross-examination that none of the information previously supplied by the informant had ever led to either an arrest, conviction or even a seizure of narcotics.

REASONS FOR GRANTING THE WRIT.

A. The District Court and the Circuit Court Erred in Concluding That the Two Prongs of the Aguilar Test Are Not Independent of One Another.

The Circuit Court of Appeals concluded by holding that:

> "There is nothing in Aguilar v. Texas, supra, which gives any support to the contention that these two propositions are wholly independent of one another. We are constrained to hold that they are not and that one may furnish support to the other, at least with respect to the affidavit at hand." *United States v. Crawford,* .... F. 2d .... (9th Cir. 1972) [Slip sheet opinion at p. 3].

It is submitted that the holding of the Circuit Court as recited above flies in the fact of precedent long since established by this Court. In *Aguilar v. Texas, supra,* this Court made it plain that it was a two prong test that was being established and that the affidavit in support of the issuance of a search warrant would henceforth be required to satisfy not just one prong of the test, but both. Accordingly, it was there held that:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed. 2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, 84 S. Ct. 825, was 'credible' or his information 'reliable.' "

In *Spinelli v. United States*, 393 U.S. 410 (1969) this Court again made it clear that *Aguilar* had enunciated not a one part, but a two part test to determine the sufficiency of a search warrant and that both parts had to be satisfied. In discussing the application of *Aguilar* to the facts of *Spinelli*, Mr. Justice Harlan observed that "We are then, required to delineate the manner in which *Aguilar's two pronged test* should be applied in these circumstances." (Emphasis added.)

In effect the Circuit Court held that because the undisclosed informant gave a detailed recital of his personal observations this somehow lent an air of credibility to the informant which dispensed with the necessity to satisfy the second requirement of *Aguilar*, namely, that the affidavit also disclose some of the underlying circumstances from which the magistrate concluded that the informant was reliable.

> "The rather detailed statement of the underlying facts which led Agent Roberts to conclude that the narcotics were where he stated them to be, lend themselves in support of the credibility of the information and the reliability of his information." [Slip opinion, p. 3].

However, it is submitted that the two prong *Aguilar* test was established to avoid the pitfalls of just such facile logic. While it is true that an abundance of detail tends to lend an air of credibility to an informant's report it is also just as true that an individual who, for whatever reason, determines to give a false report is just as likely to supply a multitude of details as he is to give a meager report. And it was to guard against

just such a possibility that the *Aguilar* two prong test was established. A careful examination of the facts supplied by the undisclosed informant herein discloses that there was no single fact submitted that could not merely have been the product of a fanciful imagination or the end product of a vindictive or vengeful individual who without any basis in fact decides to spread a baseless rumor or to subject people to a police search.

While the Circuit Court of Appeals failed to mention this Court's previous decision in *Draper v. U.S.*, 358 U.S. 307 (1959), it is appropriate to observe that even in that opinion, which stands for the proposition that if enough detail is supplied by the undisclosed informant then an inference may be drawn that the information was gained in a reliable way, the informant was unquestionably reliable given the fact that he

> "had been engaged as a 'special employee' of the Bureau of Narcotics at Denver for about six months, and from time to time gave information . . . regarding violations of the narcotics laws, for which Hereford was paid small sums of money, and that Marsh had always found the information given by Hereford to be accurate and reliable." *Draper v. U.S., supra*, at p. 309.

Thus, this Court made it clear, even before *Aguilar*, that while a detailed report supplied by an undisclosed informant may give rise to an inference of personal knowledge on the part of the informant, it in no way dispenses with the requirement that the informant first be proven reliable or credible.

B. The Affidavit in Support of the Search Warrant Was Insufficient.

The Circuit Court below did not hold that the affidavit in question satisfied the second prong of the *Aguilar* test. Instead, the Court chose to hold that the affidavit "as a whole" . . . "is as factual as that held sufficient in *Jones v. U.S.*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960) . . ." To the contrary, a reading of the affidavit in *Jones* discloses that the affidavit in the case at bar is far inferior to the *Jones* affidavit. In *Jones,* the undisclosed informant advised precisely where in an apartment narcotics could be found stating that he had personally purchased narcotics in the apartment previously that very day. Furthermore, the affidavit went on to relate that both of the occupants of the apartment were familiar to the affiant and to others members of the narcotic squad and that both displayed needle marks on their arms and had admitted to using narcotic drugs. Lastly, the affidavit concluded by alleging that the same information had been supplied by other informants. Thus, not only was there an averment of previous reliability and of personal observation but also an averment of personal knowledge of the affiant regarding the occupants of the premises to be searched.

This additional corroboration, the personal knowledge on the part of the affiant, has long been adjudged the element that would serve to validate an affidavit that might otherwise be deemed insufficient. Indeed, in *Jones,* Mr. Justice Frankfurter observed:

> "Corroboration through other sources of information reduced the chance of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less

> subject to scepticism than would such a charge against one without such a history." *Jones v. U.S., supra,* at p. 267-268, n. 2.

In the instant case, however, the affiant had no prior knowledge whatsoever of petitioner, thereby subjecting the charge pressed against him to the same kind of scepticism that Justice Frankfurter cautioned against.

In the Court below the Government placed a mistaken reliance upon *United States v. Harris,* 403 U.S. 573 (1971), arguing, in effect, that there was no necessity to allege any previous reliability on the part of an informant. A reading of *Harris,* however, shows that this Court merely affirmed an affidavit quite similar to the *Jones* affidavit in that each disclosed personal knowledge by the informant and prior events within the affiant's own knowledge.

It is petitioner's contention that the cases from this Court reveal that in analysing search warrant affidavits the quantum of factual information supporting an informant's alleged reliability which is legally required in a search warrant affidavit is directly proportional to the amount of independent corroboration by police officers of the informant's information, *Aguilar v. Texas, supra, Spinelli v. U.S., supra,* i.e., the more corroboration of the informant's information the less reliable the informant need be. The affidavit supporting the search warrant in this case is devoid of any independent corroboration by the federal agents and in fact the petitioner was unknown to the affiant. Accordingly, it was absolutely essential to the legal sufficiency of the warrant that the magistrate be given ample facts from which to conclude that the informant was reliable. The mere allegation that an informant

has worked with an officer on previous occasions and that his information has proved valid falls far short of the specificity and particularity required by *Aguilar* and *Spinelli*.

Conclusion.

The Circuit Court concluded that the affidavit in support of the search warrant was legally sufficient and that "[t]here is nothing in *Aguilar v. Texas, supra,* which gives any support to the contention that these two propositions [the two prong test] are wholly independent of one another". Petitioner contends that the Court fell into error in both instances.

While this Court has never yet been called upon to decide the precise issue as narrowly framed by the Circuit Court below petitioner contends that a careful reading of *Aguilar* and *Spinelli* fortifies his contention that the ruling below was in error.

Finally, it is submitted that this case can provide this Court with an ideal opportunity to clarify the guidelines articulated in *Aguilar* and *Spinelli,* to give further guidance to lower state and federal courts in the recurring area of the administration of search warrants and to indicate the quantum of proof necessary to conclude that an informant is reliable.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANTHONY MICHAEL GLASSMAN,
DANIEL WEINSTEIN,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Gary Crawford, Defendant-Appellant. No. 71-2658.

[July 3, 1972]

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH and DUNIWAY, Circuit Judges, and ANDERSON,* District Judge.

ANDERSON, District Judge:

This is an appeal from a judgment of conviction based on the decision of the District Court, a jury having been waived, for having possession of a controlled substance (hashish) with intent to distribute in violation of 21 U.S.C.A. §841 (a) (1).

Prior to trial the appellant moved, pursuant to Rule 41 of the Federal Rules of Criminal Procedure to suppress, as evidence, contraband which had been seized pursuant to a search warrant and which contraband formed the basis of the indictment. At the time of the hearing on the motion, the Court, after hearing the testimony of U.S. Customs Agent, Phil Roberts, whose affidavit formed the basis for the issuance of the search warrant herein, denied appellant's motion to suppress and ruled that the warrant and the affidavit in support thereof were valid on their face. Thereafter the appellant waived trial by jury, stipulated to the allegations

*Honorable J. Blaine Anderson, United States District Judge, District of Idaho, sitting by designation.

contained in the indictment and incorporated by reference the Rule 41 hearing into the trial record. The court found the appellant guilty as charged.

The sole issue which appellant Gary Crawford raises on this appeal and with which this court is faced concerns the sufficiency of the affidavit[1] which U.S. Customs Agent Phil Roberts presented to the Magistrate in the course of obtaining a search warrant.

---

[1]"I, Philip W. Roberts, being duly sworn depose and say:

That I am a United States Customs Agent;

That on May 1st, 1971, at approximately 10:45 p.m., I received information from a confidential informant, whom I have worked with on previous occasions and whose prior information has proved valid, that three persons arrived at 852¾ N. Sanborn Ave., Los Angeles, California, on May 1st, 1971, and were in possession of five suitcases in which were secreted approximately twenty (20) kilos of hashish;

That the three persons were identified by the confidential informant as being (1) Gary Crawford (2) a male subject known only as Thomas (3) and a female known only as Florence;

That the three persons told the confidential informant that the hashish had been acquired in Afg(h)anistan and transported from Kabul to Teheran to Istanbul to Ceylon to Tokyo to Honolulu to Los Angeles International Airport by them personally;

That the same Gary Crawford mentioned herein has on at least five prior occasions offered the confidential informant the opportunity to smuggle hashish from Afg(h)anistan or other countries into the United States;

That the confidential informant has allowed the three persons mentioned herein to lodge themselves at his female companion's apartment (the female companion also being a confidential informant of the affiant);

That 852¾ N. Sanborn Ave., Los Angeles, California, is where the three persons mentioned herein are presently lodged and that they are in possession of the suitcases containing the contraband;

That 852¾ N. Sanborn Ave., Los Angeles, California, is the residence of one of the confidential informants;

That both confidential informants have been shown where the contraband is and have smelled it;

That both confidential informants are familiar with hashish;

That I believe that contained in the suitcases described herein are approximately twenty kilos (20 kilos) of hashish which have been imported into the United States contrary to law;

That the suitcases are described as (2) red suiters, (2) black suiters and (1) brown leather suiter."

The test as to whether an affidavit provides sufficient basis upon which a magistrate may issue a search warrant is governed by the test set forth in *Aguilar v. Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S.Ct. 1509 (1964).

The affidavit of U.S. Customs Agent Phil Roberts far surpasses the affidavit of the officers in *Aguilar v. Texas,* supra, with respect to the specificity of the information provided the magistrate who was called upon to issue the search warrant. Appellant concedes this is so with respect to "some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were", *Aguilar v. Texas,* supra, 378 U.S. 114, but contests the sufficiency of the disclosure of the affidavit as to "some of the underlying circumstances" of the unidentified informant's credibility or the reliability of his information. (*Aguilar v. Texas,* supra, 378 U.S. 114).

There is nothing in *Aguilar v. Texas,* supra, which gives any support to the contention that these two propositions are wholly independent of one another. We are constrained to hold they are not and that one may furnish support to the other, at least with respect to the affidavit at hand. Read as a whole, the affidavit which Agent Roberts has presented to the magistrate is as factual as that held sufficient in *Jones v. U.S.,* 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960), and furnished the magistrate with probable cause to issue the warrant. The rather detailed statement of the underlying facts which led Agent Roberts to conclude that the narcotics were where he stated them to be, lend themselves in support of the credibility of the information and the reliability of his information.

Unlike *Spinelli v. United States,* 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969), the affidavit here does explain how the informant came by his information.

It is not simply a bare statement that the Customs Agent believed the informant. The agent's own sworn statement of his dealings with the informant, when combined with the other details in the affidavit, were sufficient to justify the magistrate's conclusion as to probable cause to issue the warrant.

Agent Roberts might well have spelled out in more detail his contacts with the informant which caused him to conclude reliability and we would recommend greater detail in the future. Nevertheless, as was stated in *United States v. Harris,* 403 U.S. 573, 583, 29 L. Ed. 2d 723, 733, 91 S. Ct. 2075 (1971), ". . . we decline to apply it [*Spinelli v. United States,* supra] to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."

Counsel for the government has urged that we spell out clearly the extent to which, if any, the defendant may impeach the search affidavit at a hearing on a motion to suppress under Rule 41 of the Federal Rules of Criminal Procedure. That issue is not properly before the court and, therefore, we specifically decline comment.

Accordingly, we conclude the decision of the District Court should be, and the same hereby is, AFFIRMED.

APPENDIX B.

Judgment.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Gary Crawford, Defendant-Appellant. No. 71-2658.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATON WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 3, 1972.